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Supreme Court of the United States

October Term, 1970

No. ~~1129~~ 70-58

OLIVER T. FEIN,

Petitioner

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Oliver T. Fein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 24, 1970.

OPINIONS BELOW

The opinion of the District Court is unreported and is set forth *infra*, pp. 19-24. The opinion of the Court of Appeals is reported at 430 F. 2d 376, and is set forth *infra*, pp. 25-48.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1970. An extension of time to file this petition until December 19, 1970 was granted by Mr. Justice Harlan on October 16, 1970. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Questions Presented

1. Is a selective service registrant denied due process of law where a determination by his Local Board that he is entitled to conscientious objector status was appealed by the State Director and reversed by the State Appeal Board under procedures which, on their face and as applied in this case, do not require

a. the State Director to assign reasons for instituting an appeal;

b. disclosure to the registrant of statements by the State Director which are submitted to the Appeal Board;

c. the Appeal Board to afford the registrant an opportunity to reply to such statements;

d. the Appeal Board to accept a statement by the registrant in support of his classification;

e. the Appeal Board to confine its considerations to the record, but rather affirmatively permits the Board to utilize, without notifying the registrant, "general information regarding economic, industrial and social conditions in the community" which do not appear in the registrant's selective service file;

f. the Appeal Board to afford the registrant an opportunity to rebut any information the Board deems relevant; and

g. the Appeal Board to state the reasons for reversing the classification?

2. Does the general delegation of power to the President in 50 U.S.C. App. §460(b)(3) to prescribe "rules and regulations" for the prosecution of appeals constitute a statutory authorization for the summary procedures described above?

3. Was the State Director authorized by statute to prosecute an appeal from a determination by the local board favorable to the registrant?

4. Where petitioner has exhausted all administrative procedures and been ordered to report for induction and that order is predicated upon "blatantly lawless" conduct by an appeal board of the Selective Service System, is a district court barred from reviewing petitioner's reclassification prior to induction by Section 10 (b)(3) of the Selective Service Act of 1967 or by the jurisdictional amount requirement stated in 28 U.S.C. §1331(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Article III, §2 and the Fifth Amendment of the Constitution; 50 U.S.C. App. §460(b)(3); 28 U.S.C. §1331; 32 C.F.R. §§1623.2, 1626.1, 1626.11, 1626.12, 1626.24(b), 1627.1, 1627.3(a) are set forth *infra* pp. 49-50.

STATEMENT OF THE CASE

A. Selective Service Classification History of Petitioner

Petitioner is a doctor of medicine, currently practicing in the field of community health in New York City. He is a registrant of Local Board 7, Yonkers, New York, which had classified him as a student (II-S) for the duration of his academic career. Thereafter registrant received a II-A occupational deferment for one year for performance of work in the national interest coinciding with his internship in medicine and pediatrics at Cleveland Metropolitan General Hospital.

In September, 1967, while petitioner was occupationally deferred, he indicated to his Local Board by letter that he was conscientiously opposed to participation in war in any form by reason of his religious training and belief and thereafter filed a conscientious objector application form.

In support of his application, petitioner had recited early and rigorous training by parents, the Lutheran Church, a Quaker education, his participation in the civil rights movement, his medical training and his activity while an intern establishing a ghetto community health project in 1966, at the request of the Students for a Democratic Society.[1]

Subsequently the Local Board carefully canvassed petitioner's claim both by examination of his demeanor and beliefs at two personal interviews and by examination of reference letters from a clergyman, the Dean of Western Reserve Medical School, and numerous colleagues. After the first interview on November 15, 1967, the Local Board, consistent with 32 C.F.R. 1623.2, which requires that a registrant be placed in the lowest classification to which he is entitled, retained him in classification II-A stating that he did not qualify as a conscientious objector "at that time".

Following reclassification to I-A and a subsequent detailed personal interview, the Local Board on May 27, 1968, found that petitioner met the standards of sincerity and opposition to participation in war in any form based upon his religious training and belief, and classified him as a conscientious objector (I-O).

B. Administrative Appeals

On June 4, 1968, petitioner received letters from both his Local Board and the State Director advising him that the State

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1. The nature of his religious belief as detailed to the Local Board is set forth *infra*, p. 51.

Director intended to appeal the Local Board's finding of conscientious objector status. Immediately upon notification, petitioner wrote both to the Local Board and to the Appeal Board, requesting:

(a) a statement of reasons for the appeal,

(b) notification of the standards to be applied on appeal,

(c) advice as to whether any additional information, other than that contained in his Selective Service file was to be presented to the Appeal Board,

(d) an opportunity to rebut any statement of reasons or findings by the State Director as to the propriety of his conscientious objector classification.

Petitioner, although he requested the information on at least two occasions, never received a pertinent response. The only response of any kind from the Appeal Board to the inquiries by petitioner was a form styled Individual Appeal Record dated June 20, 1968 which stated that by a vote of 4-0 he had been classified I-A. No reasons were given on that form or otherwise for the reclassification nor was there any statement of the standards used in concluding that the Local Board had erred in finding petitioner to be a conscientious objector.

On July 31, 1968, petitioner was ordered to report for induction[2]

C. Judicial Review

On February 10, 1969, petitioner filed suit in the United States District Court, Southern District of New York, seeking a judgment declaring the Selective Service appellate regulatory scheme unconstitutional as a violation of the due process clause and seeking an order enjoining respondents from ordering petitioner's induction and restoring him to his I-0 status.

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2. This order was subsequently postponed and then cancelled pending review.

Respondents moved to dismiss the complaint on April 8, 1969 on the grounds, *inter alia*, that the District Court had no jurisdiction pursuant to Section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. §460 (b)(3). Following briefing and oral argument, the District Court on June 11, 1969, although expressing uncertainty as to the applicability of the statute, denied petitioner's application on the grounds that Section 10(b)(3) acted as a bar to the assumption of jurisdiction. See *infra*, p. 19-24.

On July 23, 1970, the Court of Appeals for the Second Circuit affirmed. The majority sustained the District Court's finding of the applicability of Section 10(b)(3) as a bar to pre-induction review. See *infra*, p. 26. Judge Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. §1331(a) deprived the court of subject matter jurisdiction. See *infra*, p. 32.

Chief Judge Lumbard, in dissent, found that the exception to §10(b)(3) carved out by this Court in *Oestereich v. Selective Service Local Board No. 11* and *Breen v. United States* was applicable, that the jurisdictional amount was satisfied by petitioner's allegations and that the actions of the State Director and the Appeal Board and the appellate regulatory scheme failed to meet minimum standards of fairness. See *infra* p. 32. In addition, Judge Lumbard noted the likelihood that the Appeal Board had utilized information outside of the record as constituted by petitioner's Selective Service file and might have indulged in an unwarranted political inference that petitioner's activities as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector. See *infra*, p. 46.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted in this case because it involves important issues of federal law, both constitutional and statutory, which have not been but should be decided by this Court.

In this case, a Selective Service registrant's conscientious objector status was summarily revoked by the State Appeal Board without affording him notice, an opportunity to be heard in rebuttal and a statement of reasons. In short, the appeal procedures employed in this case denied the registrant those minimal procedural safeguards to which the decisions of this Court, directly or by necessary implication, say he is entitled. A ruling on this point by the Court is also necessary to resolve a sharp conflict in the Circuits over the registrant's right to be notified of the reasons for denial of I-0 classification by the Local and Appeal boards.

The petition also presents the substantial questions of whether the summary procedures described above and, indeed, whether the State Director's assertion of power to appeal a Local Board determination in granting I-O status, are authorized by statute.

Finally, the petition raises a profoundly important question, which has required this Court's attention several times in recent years: does §10(b)(3) of the Selective Service Act of 1967 require the petitioner to risk a felony conviction or relinquish his liberty and religious convictions to the military before the federal courts will review the procedural unfairness and jurisdictional excesses to which he was subjected by the State Director and Appeal Board? See *Gutknecht v. United States*, 396 U.S. 295; *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460; *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233.

2. The State Director appealed the Local Board's determination made upon extensive personal examination and review of his Selective Service file granting petitioner conscientious

objector status. There is no apparent reason for the State Director's action and none was stated by him, the Local Board or the Appeal Board. The State Director prosecuted and the Appeal Board considered the appeal, ignoring completely petitioner's request for a statement of the basis for the appeal, an opportunity to submit a statement on his own behalf and to rebut information the Board deemed derogatory, and a statement of reasons in the event that the Board's decision is adverse to his interests. There is also a strong indication, noted by Chief Judge Lumbard in his dissent, that the summary reversal by the Appeal Board may have been based in part on information extrinsic to the record, of which petitioner was not given notice and consequently was unable to rebut.

Nothing in the Selective Service regulations required the State Director, or the Appeal Board, to act in a more open and deliberative fashion.

There can be no doubt that a registrant, facing the consequences that follow from a I-A classification, is entitled to fairer treatment than that afforded petitioner. In fact, the summary procedures followed by the Appeal Board are irreconciliable, as Chief Judge Lumbard found, with this Court's decision in *Gonzales v. United States*, 348 U.S. 407. *Gonzales* held that a registrant must be given an opportunity to see a Department of Justice recommendation concerning the propriety of a I-O classification and "to rebut this recommendation when it comes to the Appeal Board." *Id.* at 412. See *infra*, p. 43.

The same opportunity for notice and rebuttal was held to be applicable to the Justice Department hearing. *Simmons v. United States*, 348 U.S. 397.[3] In *Simmons*, the Court ruled that a conscientious objector applicant must be given a fair résume of an F.B.I. report prepared as part of the Department's inquiry, which preceded the hearing. See also *United States v. Nugent*, 346 U.S. 1.

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3. The Justice Department review procedure was repealed by the Military Selective Service Act of 1967, 50 U.S.C. App. 456 (j).

Gonzales, Simmons and *Nugent* express the unquestionable and more general right of every person subject to administrative regulation, particularly where that regulation affects his liberty and religious freedom, to notice and a hearing. This Court recently said in *Goldberg v. Kelly*, 397 U.S. 254, 267, that the "fundamental requisite of due process of law is the opportunity to be heard" and this includes "timely and adequate notice detailing the reasons" for the action which an administrative agency proposes to take.

Given this standard the State Director was required to state the basis of his appeal with notice to the petitioner. Obviously, in the absence of defined issues, petitioner's right to be heard is meaningless.

Moreover, in the context of this case, petitioner was entitled, at the very least, to a copy of any statements filed with the Appeal Board by the State Director, to submit a statement in support of the local board's determination and in response to the State Director's statement, and to notice of and an opportunity to rebut any information, within or outside the record, which the Appeal Board regards as derogatory and intends to rely upon. See *United States v. St. Clair*, 293 F. Supp. 337, 341 (E.D.N.Y. 1968).[4]

Petitioner's right to a statement of findings and reasons by the Appeal Board for its reversal of the Local Board's determination is equally fundamental. As Mr. Justice Frankfurter ruled in *S.E.C. v. Chenery Corp.*, 317 U.S. 80, 94. "... the orderly functioning of the process of review requires that the

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4. Compare: *Scott v. Volatile*, ——F.2d—— (3d Cir. 1970) 3 SSLR 3281; *United States v. Washington*, 392 F. 2d 37 (6th Cir. 1968); *United States v. Lemmens*, ____ F.2d ____ 3 SSLR 3185; *United States v. Abbott*, 425 F. 2d 910 (8th Cir. 1970; *Caverly v. United States*, ____F. 2d ____ (8th Cir. 1970) 3 SSLR 3194; *United States ex rel. Brown v. Resor*, ____ F. 2d ____ (9th Cir. 1970) 3 SSLR 3188.

grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Court's view in *Goldberg v. Kelly, supra* at 271, was to the same effect, namely, that the "decision maker should state the reasons for his determination and indicate the evidence he relied on. . ." See also *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510-511.

Delineation by the Appeal Board of the basis for its decision insures not only effective judicial review but also that the review will be as swift and as narrowly confined as Congress intended. Without specification, the courts will be compelled to labor through the entire record to determine whether the board properly applied the correct legal standards. Even then the inquiry would not end, since without specific findings the reviewing court must assure itself that the Board has not, as it may have in this case, relied upon information extrinsic to the record. See *Goldberg v. Kelly, supra* at 271.

The rights petitioner seeks to enforce are all the more important, as Chief Judge Lumbard concluded, because the Appeal Board may take cognizance of "general information concerning economic, industrial, and social conditions." See 32 CFR §1626.24(b). Whatever this vague authority may encompass, and it should be "tightly circumscribed", as Chief Judge Lumbard noted, it is clear that the authorization exceeds the confines of judicial notice. Chief Judge Lumbard found that in this case there was a serious danger that the Board had based its decision on "invalid inferences" drawn from the fact that in 1966, while petitioner was an intern at a Cleveland hospital, he contributed his spare time to a ghetto neighborhood free clinic sponsored by the Students for a Democratic Society. See *infra*, p. 43. Only those traditional safeguards of notice, an opportunity to be heard, and a statement of reasons provide the minimum acceptable protection against such arbitrary or discriminatory action by the Appeal Board.

The Fourth and Ninth Circuits have concurred with petitioner, that a Board must state its reasons and findings when denying an application for conscientious objector status. *United States v. Haughton,* 413 F. 2d 736 (9th Cir. 1969); *United States v. Broyles,* 423 F. 2d 1299 (4th Cir. 1970). The First and Second Circuits' decisions in *United States v. Curry,* 412 F. 2d 1297 (1st Cir. 1969) and *Morico v. United States,* 415 F. 2d 138 (2d Cir. 1969) create a sharp conflict in the circuits which requires resolution by this Court consistent with such prior decisions as *Gonzales* and *Simmons* and with its broader ruling in *Goldberg v. Kelly, supra.*

3. There is no statutory authorization for the summary procedures by which the appeal of petitioner's classification was prosecuted, considered and decided. Nor, indeed, was the State Director's appeal in this case authorized. These conclusions result from the guiding principle that where, as here, the liberties of a citizen are involved, the Court "will construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles,* 357 U.S. 116, 129; see also *Gutknecht v. United States,* 396 U.S. 295; *Schneider v. Smith,* 390 U.S.17.

a. The injunction against assuming statutory authority for administrative conduct of questionable constitutional validity is undeniably applicable to an administrative practice which, like that involved here, denies all semblance of procedural fairness. *Greene v. McElroy,* 360 U.S. 474. No such assumption can be made, as the Court has said, unless Congress "specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . .not only to assure that individuals are not deprived of cherished rights" but also to prevent "decisions of great constitutional import and effect [from being] relegated by default to administrators who, under our system of government, are not endowed with authority to decide them" *Id.* at 507.

Under 50 U.S.C. App. §460(b)(3), appeals from local board determinations may be taken to the Appeal Board "in accordance with such rules and regulations as the President may prescribe." This authorization, particularly in the context of an appeal by the State Director is no more explicit authority for denying notice, an opportunity to be heard and statement of reasons and findings than was the similarly broad delegation of power considered in *Greene*. The assumption that summary procedures are authorized is nowhere less acceptable than in this case, where there exists a "strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors. . ." *United States v. Gearey*, 368 F. 2d 144, 150 (2d Cir. 1966).

b. Similarly, the general statutory authority for appeals from Local Board determinations in 50 U.S.C. App. §460(b)(3) should not be read to permit the State Director's appeal in this case.

The limitation on the power to review local board determinations granting conscientious objector status derives from the decision of the Court in *Peters v. Hobby*, 349 U.S. 331 involving an analogous proceeding. Here, as in *Peters*, the individual's interest in finality after a favorable decision is equivalent to a defendant's in a judgment of acquittal. The local board's determination, based on personal observations of the registrant and thorough evaluation of his character and background and rendered by men who represent the registrant's community should be final when favorable to the registrant. Cf. *Peters v. Hobby, supra* at 344-345.

If appeals are to be permitted from favorable determinations, then they should be limited to a situation where the State Director alleges that the local board departed from the governing legal standards or applied these standards improperly. Where, as here, the appeal seeks *de novo* review of the registrant's sincerity, it is unwarranted. The Appeal Board does

not conduct personal interviews or hold any hearings and consequently it should be bound by the Local Board's determination where personal factors are at issue.

3. This Court's decisions in *Oestereich v. Selective Service Board, supra* and *Breen v. Selective Service Local Board No. 16, supra* restate, in the context of a Congressional expression of desire to curtail judicial review, a traditional concept that where one's liberty is challenged by lawless administrative fiat, a forum must be available for redress. The decision below departed from that traditional view and from this Court's construction of §10(b)(3). In *Oestereich, Breen* and *Clark v. Gabriel*, 393 U.S. 256, the Court analyzed the standards for review and found it appropriate in situations in which a board acted in a manner that was "basically lawless". Read together these decisions stand for the proposition that in the extreme case of a board's flouting the law, as exemplified by a "retaliation against the person because of his political views", 393 U.S. at 237, or by "mov[ing] a registrant from a c.o. classification to a I-A and disregarding all the evidence denied him a c.o. classification", *supra* at 260[5] preinduction judicial review was available.

Since no disclosure of Appeal Board rationale was made, one cannot know with certainty what standard was applied by it. However, it is reasonable to speculate that the Board in an undefined fashion treated petitioner's activities in the civil rights movement in general and with the Students for a Democratic Society in particular as the basis for its decision.

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5. Given the details of petitioner's conscientious objector application, and the power pursuant to 32 CFR 1626.24(b) of an appeal board to explore "general information concerning . . . social conditions" beyond the scope of a registrant's file, Chief Judge Lumbard below thought that "the possibility of this latter sort of error is strong in this case." 430 F. 2d 376, 387 fn. 10, *infra*, p. 43.

Whether the approach of the Court is that offered by Justice Douglas for the majority in *Oestereich* or Justice Harlan in concurrence, the result is the same since in addition to the "facially unconstitutional" action by the appeal board, given the finality reflected by the Local Board's order to petitioner to report for induction, there is "no opportunity for protracted delay" and no cause of uncertainty as to classification.

The outstanding notice to report for induction is a complete answer to the court below's refusal to afford judicial review on the ground that this Court's *per curiam* decision in *Boyd v. Clark*, 393 U.S. 316, controls. Unlike *Boyd*, in which the petitioners were in an unsettled position with their respective local boards (not having been ordered to report for induction), petitioner has exhausted all administrative possibilities and is in a position of finality with the Selective Service System.

Unlike *Oestereich* and *Breen* where administrative regulations were held unauthorized as beyond the terms of a specific statute, see *Gutknecht v. United States*, *supra*, petitioner here is confronted with a series of appellate administrative regulations which are unauthorized by statute and flout due process. See *infra* p. 11-13. As Judge Lumbard suggested below:

> "The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an *a fortiori* case for preinduction review." 434 F. 2d at 382.

4. Judge Hays has posed an important question of federal law which has been presented to this Court on numerous occasions in recent years and never squarely reached, i.e.,

whether 28 U.S.C. §1331(a) can serve as a predicate to jurisdiction in a case of constitutional dimension in which a plaintiff either does not allege damages in a monetary amount or if he does cannot prove $10,000 in monetary damage.[6]

There is considerable confusion engendered by the failure to resolve the issue. In some cases this Court and lower federal courts have heard and decided the merits of cases of constitutional proportion without inquiring whether the jurisdictional amount was satisfied. *Aptheker v. Secretary of State*, 378 U.S. 500 (1965) (right to passport issuance); *Schneider v. Rusk*, 377 U.S. 163 (1964) (right to citizenship); *A Quaker Action Group v. Hickel*, 421 F. 2d 1111 (D.C. Cir. 1969) (injunction against picketing); *Thompson v. Clifford*, 408 F. 2d 154, (D.C. Cir. 1968) (right to burial in military cemetery of a deceased Communist). On other occasions, federal courts have acknowledged the requirement and glossed over it as the Second Circuit did in *Breen, supra* at 643 fn. 1, in which that court, referring to the jurisdictional amount, stated "The government has made no point about this nor shall we." Increasingly, United States attorneys raise the issue as a bar to jurisdiction and it becomes the basis for decision. *Oestereich, supra* at 239.[7]

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6. Petitioner acknowledges the reasonable dual interests of federalism to be (a) insuring that federal courts will not intrude beyond the "rightful independence of state governments" by adjudicating controversies that should be determined by state courts. *Healy v. Ratta*, 292 U.S. 263, 269-70 (1934) and (b) keeping "petty" cases out of the federal system. S. Rep. No. 1830, 85 Cong. 2d Sess. 1958, 1958 U.S. Code Cong. Adm. News. PP. 3099-3101, quoted in *Giancana v. Johnson*, 375 F. 2d 366, 368-369 fn.7 (7th Cir. 1964).

7. A variety of eminent federal judges have reflected substantial confusion over the application, if any, of §1331(a) to cases such as petitioner's. *Wolff v. Selective Service*, 372 F. 2d 817, 826 (2d Cir. 1967) (Senior Judge Medina); *Giancana v. Johnson*, 335 F. 2d 366, 371 (7th Cir. 1964), *cert. denied* 379 U.S. 1001 (dissenting opinion Judge Swygert); *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (Dissenting opinion of Judge Edelstein), *aff'd other grounds*, 393 U.S. 318; *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969) (Judge Pettine); *Berk v. Laird*, 429 F. 2d

As Chief Judge Lumbard indicated in dissent below, after acknowledging that petitioner would in all likelihood meet the jurisdictional requirement

> "... if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief." 430 F. 2d 376, 384,

and See Comment, *Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officials,* 53 Cornell L. Quarterly 916 (1968). Put another way, if §1331 may be interposed as a bar to jurisdiction in cases in which allegations of deprivation of fundamental liberties are made, federal officials who have engaged in illegal conduct are immune from judicial sanction because no forum is available.[8]

If the §1331 requirement remains, serious constitutional questions are presented, questions which have been increasingly acknowledged as troublesome by federal judges. *Boyd v. Clark, supra* (Edelstein); *Murray v. Vaughn, supra* (Pettine). Article III of the federal Constitution invests judicial power of the

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302 (2d Cir. 1970); *Moylan v. Laird,* 305 F. Supp. 551, 553 (D.R.I. 1969) (Judge Pettine); *Walsh v. Local Board No. 10,* 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969) (Judge MacMahon).

8. The issue of retention of a 19th century property qualification is an anachronism which has been the subject of a report by the American Law Institute which expresses the view that

> "... the stated requirement of an amount in controversy in fact has relatively little impact on the volume of federal question litigation. The few cases there are, however, that must satisfy the 1331 requirement are likely to involve matters *particularly deserving of a federal forum.* e.g. *Giancana v. Johnson* ... Cases in which the plaintiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy." ALI Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969), *Emphasis added.*

United States in the judiciary. Article III, Section 2 extends the judicial power to all cases which arise under the Constitution and laws of the United States. In terms there is no reference in Article III to an amount in controversy.

Petitioner has alleged and by the motion to dismiss respondent has admitted that respondent has abridged petitioner's constitutional right to due process pursuant to the Fifth Amendment. If petitioner is without any judicial forum to litigate the merits of his case apart from the federal courts, the question must then be faced whether Congress by enacting §1331 can prevent the judicial power from vesting anywhere by conditioning vindication of constitutional rights on demonstrable economic loss. The concurring opinion below effectively answered that question in the affirmative. If the opinion of Judge Hays controls, then §1331 is in conflict with the Constitution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court below.

Respectfully submitted,

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December 18, 1970

APPENDIX

UNITED STATES DISTRICT COURT

Southern District of New York

Memorandum—69 Civ. 431

OLIVER T. FEIN,

Plaintiff,

—against—

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants.

TYLER, D.J.

Oliver Fein moves to preliminarily enjoin his local draft board and the appellate hierarchy of the selective service system from ordering him to report for induction into the Armed Forces of the United States. He moves also for summary judgment declaring that Section 460(a)(2) of the Military Selective Service Act, 50 App. U.S.C. §460(a)(2) (1968) and certain selective service regulations, 32 C.F.R. 1626.1 and 1627.1(a) (b), violate the due process clause of the Fifth Amendment, both on their face and as applied to him.

The registrant, a medical doctor currently practicing in the field of community and public health in Cleveland, Ohio, graduated from Swarthmore College in June, 1962, and Western

Reserve University Medical School in June, 1967. He held a II-S (student) classification for the duration of his academic career, and upon graduation from medical school, he was granted a II-A classification (work in the national interest) during his one year internship in pediatrics at Cleveland Metropolitan General Hospital. In September, 1967, while an intern, plaintiff sought conscientious objector status from his draft board, Local Board No. 7, located in Yonkers, New York. That classification was denied him and he remained II-A. In February, 1968, upon being notified by his local board that he had been reclassified I-A, plaintiff again sought and then received conscientious objector status (I-O).

About two weeks after the local board's action, plaintiff's I-O classification was appealed by the State Selective Service Director to the Appeal Board for the Southern District of New York. Plaintiff at once sought from the local board and the appeal board a statement of reasons for the appeal but received, in his words, "no pertinent response". On June 20, 1968, the Appeal Board for the Southern District of New York overturned the action of the local board and reclassified plaintiff I-A by a vote of 4-0. No reasons for the action of the appeal board were furnished to plaintiff. On September 16, 1968, the National Selective Service Director, at the prompting of plaintiff, appealed the action of the district appeal board to the Presidential Appeal Board, with notice to plaintiff. Prior to the decision of the Presidential Appeal Board, the State Selective Service Director, in response to a request by plaintiff, informed him by letter of October 31, 1968, that in his opinion plaintiff did not qualify for deferment as a conscientious objector and that his decision to appeal the local board's action was based upon the information contained in plaintiff's selective service file. On November 26, 1968, the Presidential Appeal Board, without a statement of reasons, upheld the action of the district appeal board, thereby retaining plaintiff in the I-A classification.

Plaintiff alleges here that Section 460(a)(2) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460(a)(2) and 32 C.F.R. §§1626.1 and 1627.1 are unconstitutional in that: (1) they do not require notification to a registrant of the reasons for appeal by the State Selective Service Director; (2) they do not require a statement of reasons for a decision by the Selective Service District Appeal Board or by the Presidential Appeal Board; and (3) they do not offer a registrant the opportunity to present evidence at either the intermediate or the final appeal level. In short, plaintiff finds the statutory scheme for appeals, as implemented by the subject regulations, unconstitutional because it makes no provision for a statement of reasons for the actions of the various bodies and allows no opportunity to present evidence.

I do not reach the merits of these contentions in this action. Plaintiff's complaint is beset by various obstacles, not the least of which is the question of whether he can show jurisdiction of this court to hear this suit. Assuming, *arguendo*, that he can, he must also show that this court is not barred from exercising that jurisdiction by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 App. U.S.C. §460 (b)(3). I conclude that he cannot make this latter showing.

Section 10(b)(3) prohibits pre-induction judicial review "of the classification or processing of any registrant," such review being limited to a defense in a criminal prosecution or to habeas corpus after induction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in any form:

> *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Without elaborate analysis, Section 10(b)(3), when read in light of the Supreme Court decisions in *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), and *Clark v. Gabriel*, 393 U.S. 256 (1968), bars pre-induction review where plaintiff seeks to challenge a determination of fact, or an exercise of judgment or discretion by the local board, or, in this case, the appellate boards. The point is well made in *Clark v. Gabriel, supra*, where the Court draws a distinction between *Oestereich*, where the Court held that pre-induction judicial review would not be barred by Section 10(b)(3), and *Clark*, where the Court held that such review would be barred:

> "In *Oestereich* the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being sustained by the local board.
>
> Here the Board has exercised its statutory discretion to pass on a particular request for classification, 'evaluating evidence and. . .determining whether a claimed exemption is deserved'. *Oestereich v. Selective Service Bd.*, *ante*, at 238." 393 U.S. at 258.

Thus, it can be reasoned that plaintiff does not seek to challenge such a discretionary determination. Rather, he

challenges, on a strict legal or constitutional basis, the selective service appellate scheme as provided in the statute and relevant regulations. Consequently, my understanding, summarized above, of *Oestereich* and *Clark* at first blush would seem to justify the conclusion that plaintiff's action is not barred by Section 10(b)(3). A more recent Supreme Court case, however, vitiates this simple rationale.

In *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd.* 393 U.S. 316 (1969), four selective service registrants challenged the constitutionality of the student deferments provided in Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1) (1968) on grounds that the student deferments (1) discriminate against persons who are economically unable to attend college and (2) are arbitrary and bear no reasonable relationship to the purpose of the Act. The registrants, all classified I-A and alleging that they were unable to secure student deferments solely because they lacked the financial means to attend college, sought a declaratory judgment that the Act was unconstitutional as applied to them and injunctive relief. A three-judge panel in this district dismissed the action for lack of a justiciable controversy and for want of jurisdiction. This court reasoned that because the registrants had never been called for induction and that there had been no showing that the amount in controversy exceeded $10,000, as required by 28 U.S.C. §1331 (1964), the claim was premature.

On direct appeal, the Supreme Court ruled briefly as follows:

> "Per Curiam
>
> The judgment is affirmed, *Clark v. Gabriel, ante,* p. 256, without reaching the jurisdictional question raised under 28 U.S.C. §1331."

Confessing uncertainty as to the full meaning of the Court's cryptic citation of *Clark v. Gabriel* as the sole ground for affirmance in *Boyd v. Clark,* I nevertheless conclude that the

latter case is dispositive of this case. Specifically, I am constrained to interpret the *per curiam* statement of the Supreme Court as an indication of its conclusion that the operative facts therein placed *Boyd v. Clark* in the class of pre-induction selective service suits barred by Section 10(b)(3) because they do not fit the exceptions carved out in *Oestereich*. As in *Boyd*, plaintiff here raises constitutional objections to a regulatory scheme administered by the selective service system. To be sure, certain facts and circumstances of *Boyd* are different in some respects from those in the case at bar; nevertheless, these differences, in my opinion, are insufficient to permit me to "distinquish" *Boyd* and refuse to apply its holding here.

Parenthetically, although neither plaintiff nor defendants have raised the point, this action could be interpreted as a suit to enjoin the operation of an act of Congress on grounds that it is repugnant to the federal Constitution. As such, it might provide the basis for a motion to empanel a three-judge district court under 28 U.S.C. § 2282 (1964). A district judge, however, is entitled to dismiss such a complaint where the unsoundness of the constitutional question "so clearly results from the previous decisions of this [the Supreme] Court as to foreclose the subject. . . ." *Ex parte Poresky*, 290 U.S. 30, 31 (1933); *accord, California Water Service v. City of Redding*, 304 U.S. 252 (1938); see, also, the opinion of this court in *Green v. Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 445 (1967), *cert. denied*, 389 U.S. 1048 (1968). Here, *Boyd v. Clark*, *supra*, effectively forecloses the jurisdictional issue.

Accordingly, plaintiff's motions are denied, and defendants' motion to dismiss the complaint is granted.

June 10, 1969.

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 626—September Term, 1969.

(Argued March 24, 1970 Decided July 23, 1970.)

Docket No. 33737

OLIVER T. FEIN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.**

Appeal from an order by the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing an action by a selective service registrant, seeking an injunction against his induction and a declaration that his reclassification into I-A by the appeal board after his local board had classified him I-O was null and void. Affirmed.

* Of the District of Connecticut, sitting by designation.

MICHAEL B. STANDARD, New York, N. Y. (Rabinowitz, Boudin & Standard, of counsel), *for Plaintiff-Appellant.*

PETER R. DEFILIPPI, Assistant United States Attorney (Whitney North Seymour, JR., United States Attorney for the Southern District of New York, Patricia M. Hynes, Assistant United States Attorney, of counsel), *for Defendants-Appellees.*

BLUMENFELD, *District Judge*:

Appellant is a doctor of medicine. While obtaining his education, he was classified II-S (student deferment), and upon graduation and while serving as an intern, he was classified II-A (occupational deferment). In September 1967, while still II-A, he wrote to the local board stating his conscientious objection to war and requesting the appropriate forms. He filed an application for a I-O (conscientious objector) classification and appeared before the local board. Finding that Fein did not qualify for a I-O "at that time," the board retained him in his II-A status. In February 1968 he was classified I-A by the local board, but following a personal appearance on May 22, 1968, that board found that he qualified as a conscientious objector and classified him I-O.

About two weeks later, this classification was appealed to the state appeal board by the State Director of Selective Service. 32 C.F.R. §1626.1 (1951). Appellant sought from both the local and appeal boards a statement of reasons for the appeal, notification of the standards to be applied on appeal, advice as to whether additional information outside his file was to be presented, and an opportunity to

rebut findings by the appeal board as to the appropriateness of his classification. He received no pertinent response before the decision of the appeal board was rendered. On June 20, 1968, the appeal board, by a vote of 4-0, reversed the local board and reinstated appellant in class I-A. It gave no reason for that action.

On September 16, 1968, the National Selective Service Director, at Fein's request (no right of appeal by the registrant being available from an unanimous vote of the appeal board, 32 C.F.R. §1627.3 (1967)), appealed the decision to the Presidential Appeal Board. 32 C.F.R. §1627.1(a) (1948). Meanwhile, on October 31, 1968, the state director wrote to Fein stating that in his opinion Fein did not qualify as a conscientious objector and that his decision to appeal the local board's I-O classification was based on information in Fein's selective service file. On November 26, 1968, the Presidential Board, without a statement of reasons, upheld the appeal board.

The appellant then brought this action in the district court seeking an injunction against his induction into the armed forces and a judgment that his reclassification from I-O to I-A was null and void.

Jurisdiction was predicated on 28 U.S.C. §§1331, 1343, 1361, 1391 and 2201, and on an allegation that the matter in controversy exceeded the value of $10,000 exclusive of interest and costs.[1]

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1 The Supreme Court has not yet ruled on the jurisdictional basis for an action by a selective service registrant seeking pre-induction review of his classification, although it has entertained several such cases on the merits. *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 239 (1968) (where the remand stated in part: "petitioner must have the opportunity . . . to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. §1331"); *Clark* v. *Gabriel*, 393 U.S. 256, 259 (1968) (where the Court granted leave to proceed *in forma pauperis*); *Boyd* v. *Clark*, 393 U.S. 316 (1969) (*affirming* 287 F. Supp. 561 (S.D.N.Y. 1968) "without reaching the jurisdictional question raised under 28

The plaintiff claimed that his reclassification from I-O to I-A violated his fifth amendment right to due process in that the regulations contained no provisions requiring notice to the registrant of the reasons for appeal by the State Selective Service Director, nor for a statement of the bases of decision by the respective appeal boards and did not provide for an opportunity to present evidence to rebut the state director's appeal.

Deciding that pre-induction judicial review of the plaintiff's classification was explicitly barred by 50 U.S.C. App. §460(b)(3) (§10(b)(3) of the Selective Service Act of 1967), Judge Tyler in a well-considered opinion denied the plaintiff's motion for summary judgment and dismissed the complaint for lack of subject matter jurisdiction. We agree.

Congress amended §10(b)(3) in 1967 to add an explicit bar to judicial review

> "of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . ."

in answer to *Wolff* v. *Selective Serv. Bd.*, 372 F.2d 817 (2d Cir. 1967), which had permitted pre-induction judicial review of local board reclassifications of two II-S registrants into class I-A because of their participation in a demonstration protesting American involvement in Vietnam. Within a year after the amendment, a challenge to its scope reached the Supreme Court in *Oestereich* v. *Selective Serv. Bd.*, 393

U.S.C. §1331"). Peremptory dismissal is seldom ordered unless it appears to a legal certainty that the claim is for less than the jurisdictional amount. *St. Paul Mercury Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283, 290 (1938). In this case, the court below did not reach the issue.

U.S. 233 (1968). Oestereich was a divinity student admittedly entitled to a statutory exemption from military service under §6(g) of the Act, 50 U.S.C. App. §456(g) (1967). His draft board declared that he was a delinquent and simultaneously reclassified him as I-A for having turned in his draft card in protest to American participation in the Vietnam war. Finding that the board had acted in a "blatantly lawless manner" by depriving him of his "statutory right" to an exemption, *id.* at 238-39, the Court held that to read the amendment literally to deny pre-induction review in such a case would be "to construe the Act with unnecessary harshness." *Id.* at 238.

Having departed to that extent from a literal reading of §10(b)(3),[2] the Court undertook to elaborate its *Oestereich* holding through its opinion in *Clark* v. *Gabriel,* 393 U.S. 256 (1968), decided the same day. *Clark* v. *Gabriel* held that §10(b)(3) of the Act barred pre-induction review of the denial of a claim to classification as a conscientious objector. The Court explained *Oestereich* as a case where the board action was "without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption." *Id.* at 258. Sharply distinguishing that situation[3] from the one before it, the Court said:

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2 The Court in *Oestereich* also noted that while §10(b)(3) on its face purports "to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.* at 238.

3 *Breen* v. *Selective Serv. Bd.,* 396 U.S. 460 (1970), was held indistinguishable from *Oestereich.* The Court found that because there was no lawful basis for the use of delinquency regulations in that case to warrant the revocation of a statutorily mandated student deferment, §10(b)(3) did not preclude pre-induction review.

> "Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment." *Id.*

And, to avoid any risk of being misunderstood, Mr. Justice Douglas, who wrote for the majority in *Oestereich,* concurred in *Gabriel,* and after noting some hypothetical examples of lawless board action, went on to say: "[I]t takes the extreme case where the Board can be said to flout the law, as it did in Oestereich [393 U.S. at 233], to warrant pre-induction review of its actions." *Id.* at 260.

These two decisions by the Court convincingly dispel the notion that pre-induction review may be obtained simply by framing issues in terms of purely legal questions divorced from their factual context,[4] a tour de force attempted by the appellant in this case.

The limitation of pre-induction review to cases of "blatantly lawless" action by the board gained further confirmation in *Boyd* v. *Clark,* 393 U.S. 316 (1969), which affirmed a denial of pre-induction review to registrants classified I-A, in a one-sentence per curiam opinion: "The judgment is affirmed, Clark v. Gabriel [393 U.S. at 256], without reaching the jurisdictional question raised under 28 U.S.C. §1331." In *Boyd,* the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I-A. *See* opinion below, *Boyd* v. *Clark,* 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among

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4 The government's Jurisdictional Statement in *Gabriel* shows that Gabriel raised several constitutional issues which could have been passed on without inquiry into findings of fact or exercise of discretion by the local board. See *Breen* v. *Selective Serv. Bd.,* 406 F.2d 636, 639 (2d Cir. 1969), *rev'd on other grounds,* 396 U.S. 460 (1970).

the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Although the law of new cases may never be open and shut,[5] we have been furnished with sufficient guidance to hold that an appeal board does not flout the law in a blatantly lawless manner merely because the President has not provided certain procedural safeguards to govern the Selective Service System's administrative tribunals in determining whether a registrant is a genuine conscientious objector not "subject" to combatant training or service under §6(j) of the Act, 50 U.S.C. App. §456(j) (1967). See *Falbo* v. *United States*, 320 U.S. 549, 554 (1944). Cf. *Estep* v. *United States*, 327 U.S. 114 (1946).

The appellant had no clear statutory right to a I-O classification. Allegations of constitutional infirmities in the classification procedures did not bring this case within any exception to the bar of §10(b)(3).

Accordingly, the order of Judge Tyler dismissing the complaint is affirmed.

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5 The view that §10(b)(3)'s proscription against pre-induction review imposes such a risk of severe penalty as to "raise serious constitutional problems" in challenges to the administrative procedure of classification itself without accompanying challenges to matters within the local board's discretion was suggested by Mr. Justice Harlan in his concurring opinion in *Oestereich*, 393 U.S. at 243, as a basis for a broader holding than that adopted by the majority of the Court. That view was implicitly rejected without discussion in *Boyd* v. *Clark*, 393 U.S. at 316.

Nor was the majority in *Breen* yet ready to adopt his view, again expressed by way of a concurring opinion in that case, that pre-induction review should not be limited to cases where there is a deprivation of a clear statutory right to a certain classification. Without reweighing all the values, the present rule does give some recognition to the purpose of Congress to limit pre-induction review.

HAYS, *Circuit Judge* (concurring):

I concur in Judge Blumenfeld's opinion in regard to §10(b)(3) but would also rely upon failure to establish the jurisdictional amount under §1331 as a ground for affirming the trial court's dismissal of the action. See *Boyd* v. *Clark*, 287 F. Supp. 561 (three judge court) (S.D.N.Y. 1968), aff'd on other grounds 393 U.S. 316 (1968).

LUMBARD, *Chief Judge* (dissenting):

I dissent.

After lengthy correspondence, two personal interviews, and extensive personal testimonials, Dr. Fein was granted conscientious objector status by his local board. The State Director, without stating any grounds, appealed the classification, and the State Appeal Board reversed and reclassified Fein I-A. The State Appeal Board gave no reasons for its decision, it did not permit Fein to submit a statement in support of his classification, and it may not even have relied solely on information in the file. In this suit to enjoin his induction Fein argues that such treatment does not meet minimum standards of due process, as developed by the federal courts over the last three decades. See, e.g., *United States* v. *Morgan*, 304 U.S. 1, 18 (1938). I agree.

The majority, however, holds that, as interpreted by the Supreme Court, Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(a)(2), bars the preinduction review sought by Dr. Fein. I cannot accept my brothers' readings of the relevant Supreme Court decisions. To me, Fein's claim is not barred by the literal words of Section 10(b)(3), and I think the exception to that section recognized by the court in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1969) reaches this case as both

here and in *Oestereich* a presidental regulation must fall to a higher command. I would also hold that the $10,000 jurisdiction amount required by 28 U.S.C. §1331 is satisfied by Fein's allegations.

I. *Section 10(b)(3)*

The language of Section 10(b)(3) prescribes preinduction review "of the classification or processing of any registrant." Concurring in *Oestereich*, Mr. Justice Harlan gave a gloss to those words which I accept. He read "classification or processing" to encompass "the numerous discretionary, factual and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction." 393 U.S. at 240. At issue in this case, however, are procedural rules governing appeals to the State and Presidential Appeal Boards, and I do not read Section 10(b)(3) as explicitly barring a claim that the procedures involved are invalid under the due process clause. At stake is not a board determination "processing or classifying" the registrant, but the procedures underlying the way such determinations are made.[1]

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1 This interpretation of the section is reinforced by its legislative history. In his *Oestereich* concurrence, Mr. Justice Harlan isolated two major considerations behind Congress' decision to defer judicial review of decisions involving classification or processing. First, because these determinations are of a highly discretionary nature, judicial review—although narrow—still would take considerable time, as often the courts must examine board records, hear testimony, and resolve controversies on a sizeable record. Second, it can be presumed that, with the full opportunity to be heard afforded by the system, a registrant's board has classified him properly, in accordance with the applicable statutes and regulations. See 393 U.S. at 240-41.

These factors, as Mr. Justice Harlan points out, are significantly altered when the registrant challenges a procedure used by the system. This sort of claim does not require the court to review discretionary determinations, so there is no protracted delay; usually, the case can be tried on a stipulated set of facts. Further, there can be no presumption of regularity, since the issues raised are beyond the system's

My brothers argue, however, that this interpretation of Section 10(b)(3) is foreclosed by the opinions of the court in *Oestereich, Breen* v. *Local Board No. 10,* 396 U.S. 460 (1970), and *Clark* v. *Gabriel,* 393 U.S. 256 (1968). A reading of these cases leads me to the opposite conclusion, as I find the claim of Board "lawlessness" Fein raises to be substantially similar to the situations presented in *Oestereich* and *Breen.*

Oestereich was enrolled as a divinity student preparing for the ministry when he turned in his draft card to protest the United States' participation in the war in Vietnam. Shortly thereafter, his local board declared him delinqent for failure to have his registration certificate in his possession and to keep the board informed of his local status. The Board then reclassified him I-A and, after an unsuccessful appeal, he was ordered to report. At that point, he brought suit to restrain his induction. *Breen* is quite similar, save that the petitioner was a college student with a II-S deferment when he was declared delinquent and reclassified I-A.

In *Oestereich,* the court framed the question presented as whether Section 10(b)(3) barred a preinduction challenge to a reclassification based on the delinquency regulation. The court held, first, that as there was no statutory authorization for the Board to revoke the statutorily-based ministerial exemption, its action was "basically lawless"; second, that Section 10(b)(3)'s restriction on preinduction re-

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competence, perhaps even its jurisdiction. On my reading of the legislative history, Congress passed Section 10(b)(3) to meet a specific problem: the vexatious delays caused by preinduction review of certain kinds of claims, see *Clark* v. *Gabriel,* 393 U.S. 256, 258-59 (1968). Had Congress wanted to prevent all registrants from seeking the aid of the federal courts on any matter involving the Selective Service System before induction, it would have used general language, not a specific prohibition covering only two areas.

view cannot, if it be constitutional, be read literally as a literal reading would command that the writ of habeas corpus be suspended; and third, that an exception must be implied to permit review of board actions which revoke a statutory right on the basis of a power conferred only by Selective Service regulations. *Breen* follows *Oestereich* closely, the only difference being that *Breen* had a statutory deferment rather than an exemption.

Clark v. *Gabriel*, 393 U.S. 256 (1968), decided the same day as *Oestereich*, confirmed Mr. Justice Douglas' statement in *Oestereich* that "[o]ur construction leaves §10 (b)(3) unimpaired in the normal operation of the Act." 393 U.S. at 238. Gabriel sought preinduction review of the board's refusal to grant him conscientious objector status. In holding that Section 10(b)(3) barred the suit, the court per curiam in a unanimous opinion explained *Oestereich* as

> "In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student was by statute, unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which the appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(j) (1964 ed. Supp. III)."

393 U.S. at 258. To me, Fein's claim falls squarely within the *Oestereich* exception.

In *Oestereich, Breen* and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority.[2] The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither *Oestereich, Breen,* nor this case are there any discretionary determinations of the system involved, nor are there any factual inquiries required. See *Bucher* v. *Selective Service System,* 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the *Oestereich* exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the *Oestereich* exception is to be read narrowly, so as to turn "on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification," *Breen* v. *Selective Service Bd.,* 396 U.S. 460, 468 (1970) (Harlan, *J.,* concurring), I would recognize a third

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2 The Selective Service Acts themselves are silent about what procedures are to be followed on appeal; the only instructions are that appeals are authorized and are to be taken "in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. App. §460 (b)(3). On the effect of such a delegation generally, see *Gutknecht* v. *United States,* 396 U.S. 295 (1970).

exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the board administers are "facially invalid." *Oestereich* v. *Selective Service System*, 393 U.S. at 240 (Harlan, *J.*, concurring). In *Oestereich* the court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 394 U.S. at 243 n. 6. My reading of the section and of its legislative history convinces me that Congress had no such intention. Of course, it is our duty to construe federal statutes, wherever possible, to sustain their constitutionality.[3] So, faced with the alternatives of a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intend and the statute's clear wording, I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the Constitution.

My brothers, however, would read the Supreme Court's one sentence, per curiam affirmance in *Boyd* v. *Clark*, 393 U.S. 316 (1969), on the basis of *Clark* v. *Gabriel*, to fore-

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3 See, e.g., *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932):

> "When the validity of an Act of Congress is drawn into question, and even if a serious doubt is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided."

See also *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, *J.*, concurring); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, *J.*, concurring).

close this exception. In my view, *Boyd* is completely distinguishable. The petitioners in *Boyd,* four college-age youths who alleged they could not afford to attend college, sought to challenge the constitutionality of student deferments on equal protection and due process grounds. Without reaching the effects of Section 10(b)(3), the three-judge district court dismissed on the ground that the case was not ripe for adjudication since none of the petitioners had yet been called for induction. 287 F. Supp. 561 (S.D.N.Y. 1968).[4]

The reasons for the rule are sound. Since the registrant may never be called, the rule serves to protect the system "from becoming entangled in litigation which may be unnecessary." *Boyd* v. *Clark,* 287 F. Supp. at 564. Although this rule predates Section 10(b)(3), Congress obviously intended that it be codified therein. See Senate Rpt. No. 209, 90th Cong., 1st Sess. (1967), 1967 U. S. Code & Admin. News 1308; *National Student Ass'n* v. *Hershey,* 412 F.2d 1103, 1107 (D.C. Cir. 1969).

In terms of *Clark* v. *Gabriel* petitioners in *Boyd* stood vis-a-vis their local boards in an unsettled position, as their boards might have to make several discretionary decisions, involving "a determination of fact and an exercise of judgment," *Clark* v. *Gabriel,* 393 U.S. at 25[illegible], before issuing orders to report. For example, the Board might be asked to consider new requests for exemptions or deferments, which of course involve discretion. Even determining the order of call is heavily tinged with discretion, as the local board has extensive powers to alter the order as between registrants with I-A status. See 32 C.F.R. §§1631.7, 1632.2;

4 As an alternative grounds for dismissing the action, the court held that the jurisdictional amount requirement of 28 U.S.C. §1331 had not been met. In affirming, the Supreme Court specifically avoided this question. See part II *infra.*

United States v. *Weintraub*, slip opinion 3421 (2 Cir., June 23, 1970); *Green* v. *Local Board No. 87*, 419 F.2d 813 (8 Cir. 1970).

In affirming *Boyd* on the basis of *Clark* v. *Gabriel*, it seems to me that the court looked not to the nature of the issue presented—which, like Fein's claim, was solely a question of law based on a constitutional challenge—but to the fact that petitioners there had not reached a position of finality within the system. To allow suits before a notice of induction is received would create exactly the sort of "'litigious interruptions of procedures to provide necessary military manpower' which Congress sought to prevent when it enacted §10(b)(3)," *Clark* v. *Gabriel*, 393 U.S. at 255-256 (quoting Sen. Russell). As Fein has been ordered to report, *Boyd* v. *Clark* has no relevance to this case.

II. *Jurisdictional Amount*

Having found that Fein's action was barred by Section 10(b)(3), neither Judge Blumenfeld nor the district court reached the question of whether Fein's allegation that more than $10,000 was in controversy in the present action satisfied the requirements of 28 U.S.C. §1331 (1964). My brother Hays, however, advances jurisdictional amount as a second ground for affirming the judgment below, and with this I disagree.

Judge Hays, arguing from the position he expressed in his opinion in *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), begins with the proposition that the amount in controversy must be reasonably capable of monetary valuation. He then would find the jurisdictional amount here unsatisfied even though Fein was never allowed to prove his allegation, so his second proposition must be that because the value of the rights denied is inherently incapable

of valuation, a registrant can never satisfy Section 1331. Any such per se rule, however, has recently been rejected by this court. In *Berk* v. *Laird,* slip op. 3379, 3385 (June 19, 1970), we held that a soldier who alleges that he is being unconstitutionally ordered into a war zone has met the requirements of Section 1331, since the allegedly unconstitutional action of the government might lead directly to his suffering serious injury or death.

Berk demonstrates that when traversing a jurisdictional allegation, the defendant has a heavy burden. Moreover, the Supreme Court has made it clear that

> "The rule governing dismissal for want of jurisdiction in cases brought in the federal courts is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

St. Paul Mercury Indemnity Co. v. *Red Cab Co.,* 303 U.S. 283, 288 (1938). Although Fein seeks an injunction, not money damages, the same rule applies, with the inquiry looking to "the value of the right to be protected or the extent of the injury to be prevented." C. Wright, Federal Courts, §34, at 116 (2d ed. 1970). For all that appears at this stage, Fein's allegation may rest on a good faith belief that service will result in monetary loss: he may be deprived of several years lucrative private practice or an opportunity for further, specialized training which will permit him to earn more later in his career. In the absence of bad faith or a legal certainty that the allegation is groundless, we must credit the claim. Fein certainly made his al-

legation in good faith, and in light of *Berk* v. *Laird* it cannot be said that as a "legal certainty" the dollar value of what he will lose if illegally drafted is not at least $10,000.

Further, I think that we are required to give the most liberal possible readings to jurisdictional allegations in cases such as this. See *Murray* v. *Vaughn*, 300 F. Supp. 688, 694 (D. R.I. 1969); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969). For if the $10,000 requirement of Section 1331 closes the doors of the federal courts, petitioners complaining of unconstitutional acts by the Selective Service System will have nowhere to go for relief. Mandamus under Section 1361 is rarely available,[5] the Selective Service System itself has neither the competence nor the power to pass on the constitutionality of procedures mandated by presidential regulations, and in this context, the concurrent jurisdiction of state courts is highly questionable. See Comment, Draft Reclassifications for Political Demonstrators—Jurisdictional Amounts in Suits Against Federal Officers, 53 Corn. L.Q. 916, 926-929 (1968).

Since Fein clearly can sustain his jurisdictional allegation, I need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure.

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5 Compare *Feliciano* v. *Laird*, —— F.2d —— (2 Cir., April 16, 1970), with *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2 Cir. 1968), cert. denied, 394 U.S. 929 (1969).

III. *The Merits*

Under the regulations, the State Director may appeal any classification of the local board at any time. Section 1626.1. He may attach to his appeal a statement specifying the grounds for his appeal. Section 1626.12.[6] In reviewing the appeal, the Appeal Board has the following warrant:

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

Section 1626.24(b). Apparently, it also may consider the information contained in the appellant's statement. If he deems the matter to be "in the national interest or necessary to avoid an injustice," the State Director may appeal any determination of the Appeal Board to the Presidential Appeal Board. Section 1627.1.[7]

Fein claims these procedures violate due process in that (1) they do not require that the registrant be notified of

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6 Section 1626.12 provides that:

> "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

7 The regulations provide that if there has been at least one dissent at the state level, the registrant himself may appeal. Section 1627.3. Here, however, the state board had reversed Fein's classification unanimously, and the State Director took an appeal for the registrant.

the reasons for appeal advanced by the State Director; (2) no statement of the reasons for the Appeal Board's decision is required; and (3) the registrant-appellee is given no chance to submit evidence, information or arguments to the Appeals Board.

Fein's first claim—that when the State Director, as appellant, chooses to exercise his right under Section 1626.12 to submit a statement, the registrant must be given a copy and be provided an opportunity by the Appeals Board to offer a rebuttal—is unquestionably correct. See *United States* v. *Cummings*, 425 F.2d 646 (8 Cir. 1970); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). In *Gonzalez* v. *United States*, 348 U.S. 407 (1965), the Supreme Court unequivocally stated that at least so much is required by minimum notions of due process. There, the registrant was not shown a Department of Justice recommendation on his request for conscientious objector status.[8] Reversing his conviction the Court noted:

> [A] registrant [must] be given an opportunity to rebut this recommendation when it comes to the Appeals Board, the agency with the ultimate responsibility for classification.

348 U.S. at 412. The State Director's statement on appeal, which may refer to any information on the registrant's file "which [the person appealing] believes the local board has failed to consider or to give sufficient weight," is indistinguishable from the Justice Department's recommendation under the formal procedure.

Here, however, the State Director by affidavit stated that he did not exercise his option to append a statement to his

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8 This procedure is no longer in effect, having been repealed by the Military Selective Service Act of 1967. 50 U.S.C. App. 456(j). (1964), repealed by P.L. No. 90-40, §1(7) (1967).

notice of appeal; rather his letter to the Appeal Board noted only that in his opinion Dr. Fein did not qualify for I-O status and that his opinion was based on information in Fein's file. In this posture, Fein's argument must be that due process compels the State Director to frame the issues on appeal or, in the alternative, that registrant-appellee be given an opportunity by the Appeal Board to support the local board's decision. As to the first, the government might convincingly argue that since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage.

Fein's alternative contention seems far stronger. Under the regulations, Fein, as appellee, has no right to submit anything in support of the classification below. Certainly, it would be helpful to the Board if the registrant could submit a short statement which marshals the evidence in support of his classification. Fein apparently sought permission to file such a statement with the Appeal Board, but received no response to his inquiry. If the State Director can submit a statement to support his appeal, I think fundamental fairness requires that similarly the registrant-appellee be permitted to be heard in support of the classification he has received.

Fein also argues that the Appeal Board's practice of refusing to give reasons when reversing a classification favorable to the registrant also violates due process. We have recently held that, at least when the registrant appeals, due process is not violated as long as "[t]here was sufficient evidence in the file for appellant to determine the basis for the denial of his claim." *United States* v. *Morico*, 415 F.2d 139, 143 (2 Cir. 1969), rev'd on other grounds, 39 U.S.L.W. 3520 (1970). When, however, it is the State

Director who appeals, several considerations lead me to conclude that a different standard must obtain.

First, the Appeal Board is empowered by the regulations to take cognizance of "general information concerning economic, industrial, and social conditions." Section 1626.24(b). This is an unusual provision, going well beyond the confines of judicial notice. See Preliminary Draft, Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 2-01 (March 1969).[9] Further, the registrant is not informed that the Board is in any way depending upon outside information in reaching a decision nor is he given a chance to rebut its accuracy or relevance. Although our review of a draft classification is tightly proscribed to "any basis in fact," the basis in fact must either be within the four corners of the file, see *United States* v. *Abbott*, —— F.2d —— (9 Cir., April 28, 1970) or the registrant must have been informed of any outside information which is to be considered before the Board decides and given a chance to rebut.

To my mind, the use of such information should be tightly circumscribed. Not only may this information, gathered from well-neigh any source and unchecked by any sort of rebuttal, be simply wrong, see *Bengoecha* v. *Micheli*, 295 F. Supp. 257 (D. P.R. 1969), but it might lead

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9 The Draft Rule imposes strict controls on judicial notice:

"(b) Kinds of Facts. A judicially noticed fact must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute."

Rule 2-01(b). Further, provision must be made for challenges:

"(e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."

Rule 2-01(e).

to wholly invalid inferences.[10] To prevent such misinformation, I would require the Appeal Board either to disclose in advance any "general information" it thinks relevant and give the registrant a chance to rebut or else positively to disclaim any such reliance.

Second, I note that several circuits have now adopted a rule requiring that when a registrant establishes a prima facie case for conscientious objector status, the local board and the Appeal Board must state their reasons for denying the request. In *United States* v. *Houghton*, 413 F.2d 736 (9 Cir. 1969), the Ninth Circuit in reversing a conviction of a conscientious objector for failure to report, stated that

> "Inconsistent statements of actions or a finding of insincerity may support the denial of conscientious status. The local board, however, must state the reasons for the denial of a requested classification when a registrant has 'met the statutory criteria' for classi-

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10 The possibility of this latter sort of error is strong in this case. I note that Fein, in his Selective Service Form 150, stated that while an intern at a highly respected Cleveland hospital, he voluntarily chose to live in the Cleveland ghetto and contributed the very little free time he had to a neighborhood free clinic. The clinic was run by the Students for a Democratic Society. Can any court say with assurance that the Appeal Board may not have seized upon this fact and read it out of context against Fein, under its license to consider "general information about . . . social conditions?"

Even if it be assumed that Fein belonged to SDS and that an inference going to the sincerity or content of a conscientious objector claim could be drawn from the fact of active membership, I am certain that the New York State Appeal Board has no knowledge whatsoever of the principles and ideology of an SDS chapter in Cleveland more than four years ago. It goes without saying that before any inferences may be drawn, there would have to be positive proof that these tenets disqualified a subscriber from conscientious objector status, that Fein knew these tenets, and that he affirmatively embraced them. See, e.g., *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 131 (S.D.N.Y. 1969), prob. juris. noted, 38 U.S.L.W. 3253 (Dec. 10, 1969).

> fication or . . . has placed himself 'prima facie within the statutory exemption.' Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case."

413 F.2d at 739 (citations omitted). Accord, *United States* v. *Broyles*, —— F.2d —— (4 Cir., March 19, 1970) *(en banc)*.

Whether or not the local board need so state reasons whenever a prima facie case is established, see *Morico* v. *United States, supra*, I think it clear that the Appeal Board must do so when the registrant has been granted I-O status below. If in defense to a criminal prosecution for refusal to submit to induction Fein obtains judicial review of this decision, the court would be limited to the "any basis in fact" standard. This means that we would search his file to find any rationale which would support the Appeal Board's decision. In the usual case, where both bodies have rejected the registrant's claim, perhaps this approach is adequate; in any case, it is settled law that our review is so limited. But when the local board has found that the registrant is sincere in his beliefs and that his beliefs meet the statutory criteria, I think a search through the file for any rationale to support the Appeal Board is impermissible. Although the Appeal Board is nominally superior to the local board, I cannot see that its judgment, without the benefit of an interview with the registrant, is to be preferred unless accompanied by an explanation. If it does not agree with the local board, it must state in what ways

it disagrees. Otherwise, reviewing courts—as both the Fourth and Ninth Circuits have found—are blind to potential mistakes of law made by the Appeal Board in the difficult area of conscientious objector classifications.

Thus, when the State Director appeals, due process requires: first, that the registrant be given a copy of any statements the State Director submits on appeal and then be given a chance to respond; second, that the registrant be given the opportunity to submit a statement in support of his classification; third, that the Appeal Board positively disclaim any reliance on "general information" or, if it has so relied, give the registrant ample notice of the information it thinks relevant and a chance to rebut; and fourth, the Appeal Board state the rationale for any decision which reverses the local board.

I would reverse the judgment of the district court and remand with instructions that the injunction Fein seeks should issue.

Military Selective Service Act of 1967

§10(b)(3) 50 U.S.C. App. §460(b)(3)

No judicial review shall be made of the classification or processing of any registrant by a Local Board, Appeal Board, or the Presidential Appeal Board except as a defense to a criminal prosecution. . . .

28 U.S.C. §1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Selective Service Regulations

32 CFR

1626.1 Appeal by Director and State Director.—Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time.

1626.11 How Appeal to Appeal Board Is Taken.—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

1626.12 Statement of Person Appealing.—The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

1626.24 Review by Appeal Board.

* * *

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

1627.1 Who May Appeal to the President From Any Determination of an Appeal Board.—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.

1627.3 Appeal to President.—When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) notifying the registrant of this classification by the appeal board. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 30-day period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 30-day period was due to lack of understanding of the right to appeal or to some other cause beyond the control of such person.

Portion of Affidavit of Petitioner Read in Support of Motion for Injunction and Declaratory Judgment.

"(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

"(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

"(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basis spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change, and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it has presented me with a new training ground for the practice of my beliefs.

"(d) There was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war." (1Ga-17a)